Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77- 77-534

UNITED STATES OF AMERICA, ex rel. ELEANOR CHASE,

Petitioner,

v.

RONALD WALD and HAYDEN THOMPSON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Petitioner, Eleanor Chase, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 20, 1977.

OPINIONS BELOW

The opinion of the United States District Court for the District of North Dakota is unpublished. The opinion of the Eighth Circuit Court of Appeals is reported at 557 F.2d 157 (8th Cir. 1977). Both are appended to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1977. Chase's timely petition for rehearing was denied on July 12, 1977. Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is a regulation defining the livestock trespass penalty of 25 U.S.C. § 179 as $1 per day per animal within the lawful authority of the Secretary of the Interior?

STATUTE AND REGULATION INVOLVED

25 U.S.C. § 179 (R.S. 2117; 31 Stat. 871; 32 Stat. 504).

> Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 per animal of such stock. This section shall not apply to Creek lands.

25 C.F.R. § 151.24 (34 F.R. 9383).

> The owner of any livestock grazing in trespass on restricted or trust Indian lands is liable

> to a penalty of $1 per head for each animal thereof for each day of trespass, together with the reasonable value of the forage consumed and damages to property injured or destroyed . . . .

STATEMENT OF THE CASE

Petitioner brought this qui tam action in the North Dakota Federal District Court seeking recovery of damages and statutory penalties for trespass to her Indian trust lands within the Fort Berthold Indian Reservation and an injunction against further trespass. The action was brought in the name of the United States pursuant to 25 U.S.C. § 201, and the trial court sustained jurisdiction pursuant to 18 U.S.C. § 1355. Petitioner sought the penalty provided by 25 C.F.R. § 151.24 and 25 U.S.C. § 179. Trial to a jury resulted in judgment for plaintiff/petitioner in the amount of $12,600. The jury awarded $600 for forage consumed, $3,000 for damage to the land, and $9,000 for trespass of 200 animals for 45 days calculated pursuant to 25 C.F.R. § 151.24.

Respondents appealed to the Eighth Circuit Court of Appeals, which reversed and ordered that the trespass penalty be reduced

to $200. The Court of Appeals invalidated 25 C.F.R. § 151.24's definition of the trespass penalty as $1 per day per animal as beyond the authority of the Secretary of the Interior.

Petitioner Eleanor Chase is 71 years old and an enrolled member of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota. Land within the Reservation is held in trust for her by the United States. On August 30 or 31, 1973, she was informed that cattle were trespassing on her land. On September 6 she was able to reach the nearest offices of the Bureau of Indian Affairs (BIA) to complain. On September 10, the BIA notified respondents that their animals were trespassing. The animals were removed on September 29. Evidence at trial showed that respondents' animals had been on and off Mrs. Chase's land since as early as May 6, 1973; the jury dated its penalty award from August 15, 1973.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DIRECT CONFLICT BETWEEN CIRCUIT COURTS OF APPEALS.

The question presented by this petition was also decided this year by the Tenth Circuit, which reached the opposite result from the Eighth Circuit. United States ex rel. Whitehorse v. Briggs, 555 F.2d 283 (10th Cir. 1977). The

Tenth Circuit sustained the validity of the regulation struck down by the Eighth, 25 C.F.R. § 151.24, reasoning:

> To give the statute the construction argued for here by [defendant's] counsel would completely defeat the intent of, and purpose behind, the statute, and would, for example, permit a cow to trespass and graze on Indian land for a day, a month, a year, or forever, upon the payment of a statutory penalty in the amount of $1. We do not believe the statute dictates such a result.
>
> Actually, both the statute and the regulation are aimed at the act of trespassing onto Indian land. The intent behind both the statute and the regulation is that each trespass constitutes a separate violation. As was noted in Fraser v. United States, 261 F.2d 282 (9th Cir. 1958), cattle have a proclivity to wander, and the regulation in our view is an attempt to recognize that fact. In the instant case [defendant's]

> cattle trespassing onto Indian land did not thereafter remain stationary within the confines of such Indian lands, but, on the contrary, were constantly exiting and re-entering such land. The penalty prescribed by the regulation is indicative that the Secretary is aware of the tendency of cattle to drift, and the regulation itself constitutes a proper exercise of the Secretary's regulatory power.

555 F.2d at 288. Thus two federal circuits each having large areas of Indian trust lands are operating under very different legal rules governing livestock trespass on Indian lands.

II. THE RULING OF THE COURT BELOW IS ERRONEOUS.

The manifest intent of 25 U.S.C. § 179 is to deter trespasses to Indian trust lands. United States v. Ash Sheep Co., 250 F. 592, 594 (9th Cir. 1918), affirmed, 252 U.S. 159 (1920). The Eighth Circuit construed the statute to allow of only one construction by the Secretary, to permit a penalty of no more than $1 per animal regardless of the duration of the trespass. As the Tenth Circuit correctly notes in its opinion

just quoted, this construction presents serious practical difficulties. On the one hand a trespass enduring for the life of the animal would be compensable by a penalty of only $1, becoming a very cheap way to lease Indian land. On the other hand, an animal entering Indian land many times per day could incur a very high penalty, albeit one difficult of precise calculation. Petitioner submits that the Secretary's regulation, 25 C.F.R. § 151.24, is a valid and reasonable definition to carry out the intent of Congress.

In Ash Sheep Co. v. United States, 252 U.S. 159 (1920), this Court interpreted the term "cattle" in 25 U.S.C. § 179 to include sheep, in order to carry out the intent of Congress. Despite the penalty, the Court concluded that the statute must be given a construction which "best harmonizes with the context, and most fully promotes the policy and objects of the legislature." 252 U.S. at 170. The crabbed construction by the Eighth Circuit in the instant case fails to accomplish this end.

The Executive Branch has broad authority to issue regulations to protect Indian property and resources. In addition to specific statutes such as 25 U.S.C. § 179, Congress has conferred general authority under 25 U.S.C. §§ 2, 9 and 466.

These statutes have been interpreted to allow broad administrative discretion in Indian affairs.[1/] Many Indian statutes require interpretive regulations to carry out Congress' intent. As this Court noted in a recent case:

> The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. In the area of Indian affairs, the Executive has long been empowered to promulgate rules and policies, [citing 25 U.S.C. § 9] and the power has been given explicitly to the Secretary and his delegates at the BIA [citing 25 U.S.C. § 2].

Morton v. Ruiz, 415 U.S. 199, 207 (1974). See also Fraser v. United States, 261 F.2d 282, 286

1/ E.g., United States ex rel. West v. Hitchcock, 205 U.S. 80 (1907); Udall v. Littell, 366 F.2d 668 (D.C. Cir. 1966), cert. denied, 384 U.S. 1007; Armstrong v. United States, 306 F.2d 920 (10th Cir. 1962); Board of Com'rs of Pawnee County v. United States, 139 F.2d 248, 252 (10th Cir. 1943), cert. denied, 321 U.S. 795; Rainbow v. Young, 161 F. 835 (8th Cir. 1908).

(9th Cir. 1958). It is this gap-filling authority which the Secretary exercised when he promulgated the General Grazing Regulations, 25 C.F.R. Part 151.

It is equally established that "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." Udall v. Tallman, 380 U.S. 1, 16 (1965).

The court below clearly accorded the Secretary much less authority than previous decisions of this Court, and its decision should be reversed.

CONCLUSION

For the reasons stated, this Court is respectfully requested to issue a writ of certiorari to review the judgment of the Eighth Circuit Court of Appeals in this case.

Dated October 1977.

Respectfully submitted,

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APPENDIX

UNITED STATES of America ex rel.
Eleanor CHASE, Appellee,

v.

Ronald WALD and Hayden
Thompson, Appellants.

No. 76-1666

United States Court of Appeals
Eighth Circuit.

Submitted March 15, 1977.

Decided June 20, 1977

Rehearing and Rehearing En Banc
Denied July 12, 1977.

Kermit Edward Bye, Fargo, N.D., for appellants.

Judith A. Atkinson, Pierre, S.D., for appellee.

Charles E. Biblowit, U.S. Dept. of Justice, Washington, D.C., amicus curiae for United States; Peter R. Taft, Asst. Atty. Gen., and Raymond N. Zagone, Atty., Washington, D.C., on brief.

Before MATTHES, Senior Circuit Judge, and WEBSTER and HENLEY, Circuit Judges.

HENLEY, Circuit Judge.

Ronald Wald and Hayden Thompson, defendants in this action, appeal from a judgment of the United States District Court for the District of North Dakota[1/] holding them liable to plaintiff, Eleanor Chase, an Indian, in the sum of $12,600.00 for having permitted two hundred head of their cattle to trespass on certain Indian grazing lands in which plaintiff has a beneficial interest.

Plaintiff is an enrolled member of the Three Affiliated Tribes of the Arikara, Gros Ventre and Mandan Indians and resides on the tribal reservation at Fort Berthold, North Dakota. Grazing lands on the reservation are held by the government in trust for the Indians, and individual Indians, like plaintiff, have beneficial interests in particular grazing allotments. The defendants are non-Indians, and there is no diversity of citizenship between the parties.

Although the government in its capacity as trustee for the benefit of the Indians

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1/ The Honorable Bruce M. VanSickle, United States District Judge.

residing on the reservation might have brought the suit itself, it chose not to do so. Nor has the government sought leave to intervene in the case formally, and it has not objected to the plaintiff's maintenance of the action or to her receiving for her own benefit the full amount of any recovery that she might be able to effect.[2/]

The suit was brought by plaintiff as a qui tam action authorized by 25 U.S.C. § 201 to recover a civil penalty imposed by federal law for trespassing on Indian lands. Plaintiff also sought to recover compensatory damages measured by the value of the forage consumed by the defendants' cattle and the damage to the land that resulted from overgrazing by those animals.

In addition to 25 U.S.C. § 201, other statutes involved in the case are 25 U.S.C. §§ 179 and 466 and 28 U.S.C. § 1355. Also involved is a regulation issued by the Secretary of the Interior which deals with trespasses on Indian grazing lands and which appears in present form in 25 C.F.R. § 151.-24 (1976). That regulation was preceded by

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2/ The government has filed an amicus curiae brief urging that the judgment of the district court be affirmed.

an earlier regulation which appeared in 25 C.F.R. § 71.21 (1956).

Section 179 provides that any person who "drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 for each animal of such stock." Section 201 provides that an action to recover the penalty just mentioned and other civil penalties imposed by Title 25, U.S.C. may be brought either by a private person as an informer or by the government. If an informer sues and recovers, he is entitled to retain one-half of the recovery with the other half being paid over to the government. Both § 179 and § 201 are derived from the Act of June 30, 1834, 4 Stat. 729 et seq. What is now § 179 was § 9 of the Act, and what is now § 201 was § 27 of the Act.

28 U.S.C. § 1355 gives the federal courts exclusive jurisdiction of all actions brought to recover penalties imposed by the law of the United States.

25 U.S.C. § 466 gives the Secretary of the Interior authority to promulgate regulations designed to protect Indian grazing lands. The regulation with which we are

concerned seems to have taken its present form in 1969. It is entitled "Livestock trespass," and in pertinent part is as follows:

> The owner of any livestock grazing in trespass on restricted or trust Indian lands is liable to a penalty of $1 per head for each animal thereof for each day of trespass, together with the reasonable value of the fo age consumed and damages to property injured or destroyed. The Superintendent shall take action to collect all such penalties and damages and seek injunctive relief when appropriate. All payments for such penalties and damages shall be credited to the landowners where the trespass occurs. The following acts are prohibited:
>
> (a) The grazing upon or driving across any individually owned, tribal, or Government lands of any livestock without an approved grazing or crossing permit.
>
> (b) Allowing livestock to drift and graze on restricted or trust Indian lands without an approved permit. . . .

As we read it, the regulation imposes a civil penalty for trespass and also imposes upon the trespasser liability for compensatory damages. The regulation manifests an administrative intent that recoveries effected under it shall redound to the benefit of the Indians whose lands have been the subject of unlawful trespasses.

It will be observed that the penalty imposed by the regulation is $1 per head for each trespassing animal for each day on which the trespass continues. For convenience, we will refer to this penalty as the "per diem" penalty. The earlier regulation which has been mentioned imposed a penalty of $1 per head of trespassing livestock but contained no per diem feature.

In her amended complaint plaintiff alleged that in 1973 the defendants unlawfully permitted a substantial number of their cattle to drift upon and graze the trust allotments in which plaintiff was beneficially interested. She claimed that she was entitled to the per diem penalty prescribed by the regulation and to damages.

The defendants challenged the jurisdiction of the district court and denied liability on the merits.

The district court considered the jurisdictional question in an unpublished memorandum opinion and concluded that it had jurisdiction under 25 U.S.C. § 201 read in connection with 28 U.S.C. § 1355. We agree that the district court had jurisdiction, but we feel that the question calls for some brief comment particularly since there is an absence of diversity of citizenship between the parties and since the district court declined to base its finding of jurisdiction on 28 U.S.C. § 1331 or 28 U.S.C. § 1353.

To the extent that plaintiff sought to recover a statutory penalty under 25 U.S.C. § 179 it is clear that the district court had jurisdiction under 25 U.S.C. § 201 and 28 U.S.C. § 1355. To the extent that plaintiff sought to recover compensatory damages, we think that in view of the fact that the government did not bring suit against the defendants, plaintiff had a personal cause of action for such damages, and that the district court had at least pendent jurisdiction of that cause of action which should have been exercised in the circumstances of the case.

The factual issues in the case were submitted to a jury on special interrogatories after the district court had overruled defense motions for a directed verdict.

The jury found that the defendants unlawfully permitted two hundred head of their cattle to go on plaintiff's allotment or allotments on August 15, 1973 and that the animals remained thereon until September 29 of that year; that the per diem penalty amounted to $9,000.00; that the value of forage consumed was $600.00; and that as a result of overgrazing the land had been damaged to the extent of $3,000.00.

The district court accepted the jury's findings and entered judgment against the defendants in the total sum of $12,600.00. Notice of appeal was timely filed after a motion for judgment notwithstanding the verdict, or, in the alternative, for a new trial, had been overruled.

We do not understand the defendants to complain seriously about the factual findings of the jury, and in any event we are satisfied that the findings have substantial evidentiary support, and that the awards made on the basis of forage consumed and land damage were not excessive.

For reversal, the defendants take the fundamental position that if they are liable to plaintiff at all, their liability does not exceed the $1 per head penalty prescribed by

§ 179, and that on the basis of the jury's findings, their maximum liability would be $200.00.

The 1834 statute which included what is now § 179 was a comprehensive statute dealing with commerce between Indians and non-Indians and was also designed to keep peace on the frontier. Its objectives included the protection of the Indian country from incursions by white settlers and the protection of Indians from exploitation at the hands of non-Indians.

Section 9 of the Act, with which we are concerned, was reenacted as § 2117 of the Revised Statutes of the United States (1873) and has been construed by the federal courts in a number of cases.[3/] In all of those cases the

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3/ Ash Sheep Co. v. United States, 252 U.S. 159, 64 L.Ed. 507 (1920), aff'g United States v. Ash Sheep Co., 254 F. 59 (9th Cir. 1918); Fraser v. United States, 261 F.2d 282 (9th Cir. 1958), aff'g United States v. Fraser, 156 F. Supp. 144 (D. Mont. 1957); Hanson v. United States, 153 F.2d 162 (10th Cir. 1946); Connolly v. United States, 149 F.2d 666 (9th Cir. 1945), rev'g in part United States v. Connolly, 3 F.R.D. 417 (D. Mont. 1943); Dorris Bro's. v. United States, 37 F.2d 346 (9th Cir. 1930); Kirby v. United States, 273 F. 391 (9th Cir. 1921), aff'd 260 U.S. 423, 43 S.Ct. 144, 67 L.Ed. 329 (1922); United States v. Loving, 34 F. 715 (N.D. Tex. 1888); United States v. Hunter, 21 F. 615 (E.D. Mo. 1884).

government appeared as plaintiff,[4/] and none of them involved the current regulation with its per diem penalty.

There is no question that under 25 U.S.C. § 466 the Secretary has the power to prescribe regulations to protect Indian lands from trespasses and damages resulting therefrom. And the Secretary unquestionably has the power to cause actions to be brought in the name of the government to collect the penalty imposed by § 179, to recover damages to Indian lands resulting from trespass, and to enjoin continuing or threatened trespasses. But neither § 466 nor any other statute that has been called to our attention authorizes the Secretary to impose by regulation a civil penalty for trespass.

Hence, as far as the penalty involved in this case is concerned, the question boils down to whether the per diem penalty prescribed by the 1969 regulation is warranted by § 179; if it is not so warranted, it cannot stand. It is a well established rule of law that the rulemaking

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4/ Janus v. United States ex rel. Humphrey, 38 F.2d 431 (9th Cir. 1930), to which we have been cited was not brought under what is now 25 U.S.C. § 179. It was a suit for damages for false imprisonment brought by an individual who had been charged with a criminal violation of § 179.

power granted to an administrative agency charged with the administration of a federal statute is not the power to make law. "Rather, it is 'the power to adopt regulations to carry into effect the will of Congress as expressed by the statute.'" Ernst & Ernst v. Hockfelder, 425 U.S. 185 at 213, 96 S.Ct. 1375, 1390-91, 47 L.Ed.2d 668 (1976). See also Real v. Simon, 510 F.2d 557, 564 (5th Cir. 1975); Ruiz v. Morton, 462 F.2d 818, 822 (9th Cir. 1972); Review Committee, Venue VII, etc. v. Willey, 275 F.2d 264 (8th Cir. 1960). Cf. Commissioner of Internal Revenue v. Acker, 361 U.S. 87, 92, 80 S.Ct. 144, 4 L.Ed.2d 127 (1959), and Sell v. Parratt, 548 F.2d 753 (8th Cir. 1977).

As this case demonstrates, it is one thing to penalize a person $1.00 per head with respect to livestock which he permits to trespass on the lands of another and a quite different thing to penalize him $1.00 per day per head for the duration of the trespass. That difference must have been as obvious to the Congress in 1834 and again in 1873 as it is to us today, and Congress has never seen fit to change the statute although presumably it has been aware that damages to Indian grazing lands by trespassing cattle and sheep present a more serious problem than was presented in the early or even in the late nineteenth century.

There is simply no basis in the statute for the per diem penalty that the Secretary has undertaken to impose by his 1969 regulation, and we hold that to the extent that the regulation imposes a penalty in excess of the $1.00 per head called for by §179, it is invalid. To put it this way, the $9,000.00 penalty adjudged against the defendants by the district court was excessive by $8,800.00.[5/]

It does not follow, however, that the portion of the regulation which calls for compensatory damages in cases of livestock trespass is invalid. That portion of the regulation appeared in the earlier regulation that has been mentioned, and it was upheld in a case arising under the earlier regulation. Fraser v. United States, 261 F.2d 282 (9th Cir. 1958), aff'g United States v. Fraser, 156 F. Supp. 144 (D. Mont. 1957). We likewise uphold it, and we hold that the questions of the value of forage consumed and the damages to plaintiff's lands resulting from overgrazing were properly submitted to the jury.

5/ We so hold with full realization of the fact that the Court of Appeals for the Tenth Circuit has just reached an exactly opposite conclusion. United States ex rel. Whitehorse v. Briggs, 555 F.2d 283 (10th Cir. 1977).

The judgment of the district court is vacated, and the case is remanded to that court with directions to enter a judgment in favor of the plaintiff in the sum of $3,800.00 ($200.00 as statutory penalty under 25 U.S.C. § 179, $600.00 as representing the value of forage consumed by the cattle, and $3,000.00 as damages for overgrazing), plus the costs of the action in the district court. Each side will bear its own appellate costs.

UNITED STATES DISTRICT COURT

DISTRICT OF NORTH DAKOTA

NORTHWESTERN DIVISION

UNITED STATES OF AMERICA, ex rel., ELEANOR CHASE, Plaintiff,	)	A4-74-2
vs.	)	
RONALD WALD and HAYDEN THOMPSON, Defendants.	)	MEMORANDUM AND ORDER

Eleanor Chase, an enrolled member of the Three Affiliated Tribes of the Fort Berthold Reservation in North Dakota, brings this action in the name of the United States. She seeks to collect from the Defendants the statutory "penalty" provided in 25 U.S.C. § 179 for the trespass of cattle onto land held in trust for her by the United States of America.

Title 25 U.S.C. § 179 provides:

> Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 for each animal of such stock. This section shall not apply to Creek lands.

Title 25 U.S.C. § 201 provides:

> All penalties which shall accrue under this title shall be sued for and recovered in an action in the nature of an action of debt, in the name of the United States, before any court having jurisdiction of the same, in any State or Territory in which the defendant shall be arrested or found, the one half to the use of the informer and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

Defendants move the Court to dismiss the action for lack of subject matter jurisdiction, while Chase claims jurisdiction can be sustained under 28 U.S.C. §§ 1353 and 1355.[1/]

1/ Actions to recover under 25 U.S.C. § 179 have usually been brought by the United States; in such cases, jurisdiction can be predicated on 28 U.S.C. § 1345, The United States has declined Chase's invitation to bring or join in this suit, however.

Title 28 U.S.C. § 1353 provides in part:

> The district courts shall have original jurisdiction of any civil action involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any Act of Congress or treaty.

Since this action seeks recovery for trespass of cattle onto Indian trust lands and is not concerned - except perhaps very indirectly - with establishing whether Chase has any rights in or title to those lands, jurisdiction cannot be sustained under 28 U.S.C. § 1353.

Title 28 U.S.C. § 1355 provides:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress.

Whether jurisdiction can be sustained under § 1355 depends on whether the statutory recovery under § 179 is a "penalty" within the meaning of § 1355. Examination of some of the history of §§ 179 and 201 will aid in this determination.

Title 25 U.S.C. § 179 first appeared as § 2 of an "Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on

the Frontiers," enacted in 1796, and was then applicable only to "any stock of horses or cattle," etc. (1 Stat. 469, 470). The section was reenacted without change in 1802 (2 Stat. 139, 141). In 1834 [Act June 30, 1834, c. 161, § 9, 4 Stat. 729, 730] it was given its present form (except for the last sentence). In that form it was carried into the Revised Statutes (Rev. Stats., § 2117, which went into effect on December 1, 1873. Then, in 1901, the last sentence, withdrawing application of the statute to lands of the Creek Indians, was added. See Ash Sheep Co. v. U.S., 252 U.S. 159, 167 (1920) and the historical note after § 179 in the United States Code Annotated.

My research is not conclusive as to the ultimate origin of 25 U.S.C. § 201. However a predecessor of § 201 - in substantially the same form as the present § 201 - was a part of the Act of June 30, 1834. See U.S. v. Stocking, 87 F. 857, 858-59 (D. C.D. Mont. 1898). Consequently, the predecessors of §§ 179 and 201 were both contained in the Act of June 30, 1834, in substantially the same forms as they appear today.

No statute[2/] specifically requires that an

2/ Title 25 C.F.R. § 151.24 (1975), which seems to require that an action to recover under § 179 be brought by a superintendent of an agency of the Bureau of Indian Affairs, is examined later. See footnote 3, infra.

action to recover under § 179 be brought by the United States. In fact, § 201, as we have seen, provides:

> All penalties which shall accrue under this title shall be sued for and recovered in an action in the nature of an action of debt, in the name of the United States, . . . the one half to the use of the informer and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use. [Emphasis added.]

There are only a few old cases which discuss § 201 -- or its predecessors.

A well-reasoned case characterizes R.S. § 2124, a predecessor of § 201, as giving an "informer" the right to bring a "qui tam" action in the name of the United States. U.S. v. Stocking, supra. Contra: U.S. v. Payne, 22 F. 426 (D. C.D. Kan. 1884). Although some of the old cases limit the applicability of R. S. § 2124 to "penalties" imposed by the Act of June 30, 1834 (4 Stat. 729) - U.S. v. Stocking, supra, and U.S. v. Howard, 17 F. 638 (C.C.D. Ore. 1883) - the predecessor of § 179, as noted before, was a part of that act.

I conclude that § 201 gives a third party, or "informer," the right to bring a "qui tam"

action in the name of the United States to recover under § 179; and § 201 allows the informer to retain one-half of any recovery made in the action.[3/]

3/ I note that 25 C.F.R. § 151.24 (1975), a regulation promulgated under 25 U.S.C. § 466 by the Secretary of the Interior interpreting and applying § 179, provides in part as follows:

> The owner of any livestock grazing in trespass on restricted or trust Indian lands is liable to a penalty of $1 per head for each animal thereof for each day of trespass, together with the reasonable value of the forage consumed and damages to property injured or destroyed. The Superindendent shall take action to collect all such penalties and damages and seek injunctive relief when appropriate. All payments for such penalties and damages shall be credited to the landowners where the trespass occurs. [Emphasis added.]

"Superintendent" is defined in 25 C.F.R. § 151.1(f) as "the Superintendent of anv Agency of the Bureau of Indian Affairs."

A predecessor of 25 C.F.R. § 151.24 was examined and upheld in Fraser v. U.S., 261 F.2d 282 (9th Cir. 1958). The present regulation, however, is inconsistent with § 201 in some respects and cannot stand insofar as it conflicts with the statute.

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In this light, jurisdiction of this action could be sustained under 28 U.S.C. § 1331, the "general federal question" statute, since there is more than $10,000 in § 179 "penalties" claimed and since a cause of action can be said to "arise under" federal law if that law "creates the action." American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916) (Holmes, J.). See Wright, Law of Federal Courts, § 17, p. 57 (2d Ed. 1970). However, since Chase has not pleaded jurisdiction under § 1331, and since further amendment of the complaint would be

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Footnote 3/continued

To the extent that the regulation would require that any action to collect under § 179 be taken by the Superintendent and to the extent that it would require that any recovery under § 179 be credited to the landowners, the regulation is inconsistent with the rights of an informer under § 201 - i.e., an informer's right to sue under § 179 and retain for himself one-half of any recovery. Since in this case the "informer" and the "landowner" are the same person, and since the Defendants have made no objection to the fact that the landowner - and not the Superintendent - has brought the action, the inconsistency between § 201 and the regulation is not in issue here.

At any rate, since the "informer" and the "landowner" are the same in this case, the provision in the regulation which requires that any recovery under § 179 be credited to the landowner, in effect gives Chase the right to the United States' one-half share under § 201, otherwise withheld from an informer.

required to allow her so to plead, I examine whether jurisdiction of the § 179 claim can be sustained under § 1355.

Hales v. Winn-Dixie Stores, Inc., 500 F.2d 836, 839-40 (4th Cir. 1974), sets out various criteria to determine whether a recovery can be labeled a "penalty" within the meaning of § 1355. These criteria are:

1. Whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual;
2. Who sues and who collects and retains any judgment; and
3. Whether the recovery need have any causal connection with the wrong inflicted.

Under these criteria, I find that an action under § 179 is one for the recovery of a "penalty" within the meaning of § 1355.

That the wrong sought to be redressed by § 179 is a wrong to the public is perhaps best demonstrated by the fact that the statute was originally enacted in 1796 in an "Act to regulate Trade and Intercourse with the Indian Tribes, and to preserve Peace on the Frontiers." Then, and in 1834 when § 179 was reenacted in substantially its present form, the Indian tribes and the United States government were still in

conflict. In that era, then, it was certainly in the public interest to insure that relations with the Indian tribes were not disrupted by the unauthorized driving of animals onto their lands.

With regard to the second criterion, § 201, as I have interpreted it, allows an informer to sue for the recovery permitted under § 179 and gives "one-half to the use of the informer and the other half to the use of the United States . . . ." Thus, up to one-half of the recovery in a § 179 action may go to one who performs the public service of observing a trespass and successfully litigating a § 179 action based thereon. This fact would tend to confirm that § 179 is aimed at punishing the trespasser rather than compensating the landowner.

With regard to the third criterion, the fact that the recovery under § 179 is set at the flat rate of $1 per animal - and apparently has never changed - indicates that the recovery has little or no causal connection with the wrong inflicted.

I conclude that Chase's action under § 179 is an action for the recovery of a "penalty" incurred under an act of Congress and, consequently, that this Court has jurisdiction of the § 179 claim under § 1355.

Besides the statutory penalty under § 179, Chase seeks to recover the reasonable value of the consumed forage and damages to any property injured or destroyed by the alleged trespasses, and also seeks an injunction preventing Defendants from trespassing on her lands in the future.

These additional claims for relief may be viewed in either of two ways. First, they may be conceived of as federal causes of action under 25 C.F.R. § 151.24 (and not inconsistent with § 201). See Footnote 3, supra. Alternatively, these additional claims may be conceived of as state tort claims for trespass.

However, these additional claims for relief are conceived of, I find that I have "pendent" jurisdiction over them. Since I have jurisdiction of the § 179 claim under § 1355, there is "pendent" jurisdiction over the damage and injunctive claims, because these claims "derive from a common nucleus of operative fact" as the § 179 claim. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). See also Brown v. First National City Bank, 365 F. Supp. 1286, 1288 (S.D. N.Y. 1973), reversed on other grounds, 503 F.2d 114 (2nd Cir. 1974).

IT IS ORDERED, that Defendants' motion to dismiss for lack of jurisdiction is denied.

Finally, I note that Defendants have filed a paper entitled "Disclosure of Unnamed Indispensable Party." While apparently making no formal motion, Defendants therein name two persons who are allegedly "responsible for any penalty or damages that might be payable" as a result of this action. I do not know what Defendants hope to achieve by filing this paper. If Defendants wish to join other persons as third-party defendants in this action, they should proceed according to the Federal Rules of Civil Procedure.

Dated at Bismarck, North Dakota, this 10 day of March, 1976.

BY THE COURT:

Bruce M. Van Sickle, Judge
United States District Court

Supreme Court, U. S.
FILED
OCT 31 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77 – 534

UNITED STATES OF AMERICA, EX REL
ELEANOR CHASE
Petitioner,

vs.

RONALD WALD AND HAYDEN THOMPSON
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Attorneys for Respondents

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REASONS FOR NOT GRANTING THE WRIT

The Decision of the Tenth Circuit in U.S. Ex Rel Whitehorse v. Briggs, 555 F.2d 283 (1977) Is Clearly Erroneous.

The Tenth Circuit found no conflict between 25 U.S.C. Section 179 and 25 C.F.R. Section 151.24 stating:

> "We fail to see that there is any real conflict between the statute and the Secretary's regulation and believe the regulation is a valid exercise of the Secretary's authority." (Citations omitted). United States Ex Rel. Whitehorse v. Briggs, 555 F.2d 283, 288 (1977).

In reaching this conclusion the Tenth Circuit violated the primary principle to be followed in statutory construction. A statute is to be construed in light of its purpose. Haggar Company v. Helvering, 308 U.S. 389, 394 (1940).

Section 179 was enacted to protect Indian land from trespassing livestock by levying upon the livestock owners a penalty. This penalty has remained the same under Section 179 since its origin, a flat rate of $1.00 per animal. See Ash Sheep Co. v. United States, 252 U.S. 160, 167 (1920).

The statutory penalty serves the function of warning trespassing animals' owners that

they are to be penalized regardless of, and in addition to being held accountable for any actual damages caused by their roving livestock. The statute was not intended to enrich the Indian landowner with a windfall, but to protect him by insuring that damages to his land would be recoverable from a trespassing animal's owner in addition to a penalty in an amount clearly denominated.

Courts have consistently interpreted Section 179 as a penal statute. Connolly v. United States, 149 F.2d 666, 668 (9th Cir. 1945); United States v. Fraser, 156 F. Supp. 144, 147 (D. Mont. 1957); affirmed 261 F.2d 282 (9th Cir. 1958).

Penal statutes are to be "strictly construed". United States v. Emmons, 410 U.S. 396 (1973); Connolly v. United States, supra at 149 F.2d 669 where the court stated:

> "...(S)tatutes imposing penalties are strictly construed and pleadings to recover statutory penalties are likewise strictly construed. Furthermore, where the statute, as here, provides a remedy for collection of a penalty, that remedy must be followed in form." (footnote omitted).

The statute referred to was Section 201 of Title 25 of the United States Code. If a remedy must be followed "in form", is it not likewise necessary that the penalty, the

recovery of which that remedy provides for, be itself followed in form? The words of Section 179 set out the "form" of the penalty in language which interpreted in its ordinary, everyday sense, assesses upon the owner of trespassing cattle a penalty of one dollar for each animal that trespasses on Indian land. There is no language, ordinary or extraordinary, everyday or unusual, which assesses a penalty of more than one dollar for each trespassing animal. Yet the Tenth Circuit upheld Section 151.24 which purports to authorize the assessment of a larger penalty than is provided under Section 179. Clearly Section 179 does not authorize a penalty of one dollar per day and because it does not, the regulation is inconsistent with it and therefor invalid. As stated by the Eighth Circuit at 557 F.2d 157, 161:

> "As this case demonstrates, it is one thing to penalize a person $1.00 per head with respect to livestock which he permits to trespass on the lands of another and a quite different thing to penalize him $1.00 per head for the duration of the trespass. That difference must have been as obvious to the Congress in 1834 and again in 1873 as it is to us today, and Congress has never seen fit to change the statute although presumably it has been aware that damages to Indian grazing lands by trespassing cattle and sheep present a more serious problem than was presented in the early or even in the late 19th Century.

> There is simply no basis in the statute for the per diem penalty that the Secretary has undertaken to impose by his 1969 regulation, and we hold that to the extent that the regulation imposes a penalty in excess of the $1.00 per head called for by Section 179, it is invalid . . ."

Moreover, any doubt whether Section 179 does authorize a penalty of $1.00 per day, should be resolved in favor of the smaller penalty in accordance with the principal enunciated by the Third Circuit in Hatfried, Inc. v. Commissioner of Internal Revenue, 162 F2d 628, 633 (3rd Cir. 1947):

> "...(I)t is well settled that in the application of penalties 'all questions in doubt must be resolved in favor of those from whom the penalty is sought.' Crawford Statutory Construction, Section 240 p. 462."

Section 151.24 calls for a cumulative penalty which is not provided for in Section 179. That same principle of strict construction of a penal statute in favor of the one against whom the penalty is to be imposed, is also applicable to determine whether cumulation of a statutory penalty is proper. Bolles v. Outing Company, 175 U.S. 262 (1899).

Even where a penal statute provided that "every" offense was subject to penalty,

the cumulation of such penalties was deemed impermissible. People v. Spencer, 94 N.E. 614, 615 (N.Y. 1911). The purpose for the penalty was:

> "...to administer a warning not to continue the acts complained of. Generally, the purpose of the Legislature will be sufficiently subserved, when one violation, or one default, is recovered for, which shall act as a deterrent upon continuing to disregard the statute."

Similarly, with regard to Section 179, Congress believed that its intent to protect the Indian and deter the owner from further violation of Section 179 would be sufficiently subserved by the statutory assessment of a non-cumulative penalty of $1.00 per head of trespassing cattle. The cumulation provided for in the regulation is, according to basic principles of statutory construction, clearly impermissible. The Tenth Circuit violated the basic principles of statutory construction in upholding the validity of the regulation.

Indeed, in upholding the regulation, the Tenth Circuit encourages Indian plaintiffs to refrain from reporting trespass or otherwise using initiative to protect their land from trespassing cattle, by authorizing penalties to accumulate into enormous amounts simply by sitting back and allowing a long time to elapse before bringing the

trespass to the attention of the authorities or instituting actions. If the legislature intended such an anomalous situation it would have stated so clearly. Congress has provided for cumulated penalties in clear, unambiguous language. See for eg. 15 U.S.C. 45(e); 21 U.S.C. 23.

CONCLUSION

The Tenth Circuit erred in upholding the authority of the Secretary to promulgate Section 151.24. We therefore request that the petition for a writ be denied.

Dated this 17th day of October, 1977.

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STATE OF N. DAK.)
) ss AFFIDAVIT OF SERVICE
COUNTY OF CASS) BY MAIL

Joan Horn, being first duly sworn, deposes and says that on October 26, 1977, she served the attached BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT upon Richard B. Collins, Jeanne S. Whiteing and Judith A. Atkinson, counsel for Petitioner, by placing a true and correct copy thereof in an envelope addressed as follows:

Richard B. Collins
Jeanne S. Whiteing
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302

Judith A. Atkinson
North Dakota Legal Services
Box 217
New Town, North Dakota 58763

and depositing the same, with postage prepaid, in the United States mails at Fargo, North Dakota.

Joan Horn

Subscribed and sworn to before me this 26th day of October, 1977.

Carlene Bentley

Carlene Bentley, Notary Public
Cass County, North Dakota
My commission expires: 1-31-79